Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION,
Petitioner,

v.

NORMAN DUERR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err in holding that an employee's claim for severance pay benefits under an employee welfare benefit plan covered by the Employee Retirement Income Security Act of 1974, ERISA, does not "relate to" such an ERISA-covered benefit plan and thus is not preempted by federal law.

RULE 29.1 STATEMENT

General Motors' non-wholly owned subsidiaries and affiliates are set forth in Appendix G, App., *infra*, pp. 27a-32a.

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OPINIONS BELOW

The Opinion of the Court of Appeals is unreported and is reproduced in Appendix A, *infra*, pp. 1a-6a. The District Court's Decision and Order, which granted summary judgment in favor of Petitioner, is unpublished and is reproduced in Appendix B, *infra*, pp. 7a-15a.

JURISDICTION

The per curium opinion of the Court of Appeals was filed on August 22, 1990. A timely Petition for Rehearing was denied on November 14, 1990 (Appendix D, *infra*, pp. 17a-18a).

This Court has jurisdiction pursuant to Section 1254 (1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

This case involves the Employee Retirement Income Security Act of 1974, "ERISA", 29 U.S.C. § 1001 et seq.

Sections 502, 510, and 514 of ERISA, 29 U.S.C. §§ 1132, 1140, and 1144, provide in pertinent part:

> Sec. 502(a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) . . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> * * * *
>
> (e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.
>
> * * * *
>
> Sec. 510. Interference with Protected Rights. It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. . . .
>
> Sec. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as

> they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under 4(b). . . .
>
> * * * *
>
> (c) For purposes of this section: (1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State . . .

Sections 2, 3(1), and 4 or ERISA, 29 U.S.C. §§ 1001, 1002(1), and 1003, are reproduced in Appendix E, *infra*, pp. 19a-21a.

STATEMENT OF THE CASE

The Court of Appeals has held that an action brought in federal court in which an employee sought benefits under Petitioner's Voluntary Termination of Employment Plan (VTEP), an ERISA-covered employee welfare benefit plan, did not arise exclusively under federal law. The Court of Appeals found that although the action was connected to and made reference to the VTEP and benefits available thereunder, and although the action expressly invoked Section 510 of ERISA, 29 U.S.C. § 1140, such action did not "relate to" the employee benefit plan under the ERISA § 514(a) standard.

A. The Facts

On December 10, 1987 General Motors and the International Union of Electrical Workers, IUE, entered into a collectively-bargained agreement establishing the Voluntary Termination of Employment Plan, VTEP. Under the VTEP, hourly employees could participate and receive a lump sum severance payment in consideration of their separation from the work force. In this manner General Motors and the IUE could reduce the hourly work force without having to resort to involuntary separations or layoffs. The VTEP qualifies as an employee welfare benefit plan within the definition of ERISA § 3(1), 29 U.S.C. § 1002(1) (App. pp. 20a-21a).

In January 1988, Respondent Norman Duerr, a salaried employee of General Motors at its Delco Products Division, travelled to California while on vacation and pursued employment opportunities with McDonnell Douglas Corporation, where he accepted a position.

Upon his return to General Motors, Duerr informed his supervisors that he had accepted a position with McDonnell Douglas in California and requested a transfer to an hourly position at General Motors so that he could participate in the VTEP, thereby receiving a lump sum payment in return for his separation from employment. Mr. Duerr's request to return to an hourly position was denied and he did not receive benefits under the VTEP Program. In March 1988, Duerr resigned his employment with General Motors and moved to California to accept employment with McDonnell Douglas Corporation.

In November 1988, Duerr brought suit against General Motors in the United States District Court for the Southern District of Ohio. Duerr's Complaint (Appendix F, *infra*, pp. 22a-26a) recited that federal jurisdiction was premised on diversity of citizenship and on section 502, 29 U.S.C. § 1132, of the Employee Retirement Income Security Act of 1974, ERISA. Count I alleged a claim for breach of an oral promise; Count II alleged a claim based on promissory estoppel; and Count III alleged that General Motors' conduct constituted unlawful interference with the attainment of a benefit under § 510 of ERISA, 29 U.S.C. § 1140. The Complaint sought damages in an amount equal to the amount Duerr would have received if he had been permitted to participate in the VTEP.

In October 1989, Magistrate Merz, acting for the District Court, issued a Decision and Order ruling that Duerr's state law claims were preempted by federal law and granting General Motors' motion to dismiss such state law claims of breach of contract and promissory estoppel. The District Court also granted General Motors' motion for summary judgment with regard to the ERISA

§ 510 claim of unlawful interference with the attainment of a benefit, Appendix B, *infra*, pp. 7a-15a. The Court explained that General Motors' refusal to transfer Duerr to an hourly position so that he could receive benefits under the VTEP could not constitute unlawful interference under § 510. Rather, to be actionable under § 510, there had to be some substantial interference with the employment relationship so as to deny the employee a benefit under an ERISA-covered plan, Appendix B, *infra*, p. 14a.

In August 1990, the Court of Appeals, relying on *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1166 (1990), held that Duerr's claims for benefits under state law theories of breach of contract and promissory estoppel were not preempted by ERISA because such claims did not "relate to" an ERISA-covered employee benefit plan within the meaning of § 514(a). Accordingly, the Court of Appeals reversed the District Court to the extent it found that Duerr's state law claims were preempted and allowed Duerr to pursue such state law claims.[1]

B. The Opinion of the Court of Appeals

The Court of Appeals held that Duerr's claim that he was unlawfully refused an hourly position and thus precluded from participating in the VTEP did not "relate to" an ERISA-covered employee benefit plan. The Court expressed no doubt that the VTEP constituted an employee welfare benefit plan under ERISA.[2] Rather it relied on

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[1] Although the original decision of the Court of Appeals concluded by instructing the district court to dismiss the case without prejudice to Duerr's right to file suit in Ohio state court, this error was corrected in the Court's subsequent order denying Rehearing. App. D, *infra*, at pp. 17a-18a. Because diversity jurisdiction existed the case was remanded to the district court to consider Duerr's state law claims.

[2] Although the Court of Appeals did not discuss the question whether the VTEP constituted an employee welfare benefit plan

a three-factor test to determine whether a claim "relates to" a benefit plan: (1) whether ERISA provides a remedy, (2) whether benefits are sought under the plan and (3) whether the claim implicates the administration of the plan.

The Court reasoned that because the District Court found that Duerr was not a participant in the VTEP, he was afforded no remedy under ERISA. Further, the Court noted that because Duerr sought damages in an amount equal to the VTEP benefit payment from Delco Products,[3] his claim did not implicate the administration of the plan.

In reversing the District Court, the Court of Appeals relied on its prior decision in *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989) *cert. denied*, 110 S.Ct. 1166 (1990).[4] In *Perry*, a group of employees claimed

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under ERISA, this Court in *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *summarily aff'd mem.*, 477 U.S. 901 (1986), and numerous Circuit Courts have so held. In *Pane v. RCA Corp.*, 868 F.2d 631 (1989), the Third Circuit held that a severance benefit program was an employee benefit plan under ERISA and that a state law suit relating to that program was therefore pre-empted. Similar results were reached by the Ninth Circuit in *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985) and *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1985) and by the Seventh Circuit in *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209 (7th Cir. 1983). *Contra, Wells v. General Motors Corporation*, 881 F.2d 166 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 1959 (1990).

[3] It does not matter from whom damages are sought. ERISA, § 502(a)(1)(B) encompasses all employee claims "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his right to future benefits under the terms of the plan." Jurisdiction does not depend on the identity of the party from whom benefits are sought. Benefits under an unfunded severance pay plan are generally paid from the current assets of the employer. Thus the fact that Duerr's claim is brought against Delco Products rather than the VTEP is of no moment.

[4] The Court of Appeals in *Duerr* failed to discuss *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689 (6th Cir. 1989),

that they had been fraudulently induced to participate in an early retirement plan. The Court in *Perry* ruled that state law claims of fraud, misrepresentation, coercion and promissory estoppel did not "relate to" an ERISA-covered employee benefit plan because ERISA did not provide a remedy. Thus the *Perry* Court found that such state law claims were not preempted by the federal statute.

The Court of Appeals below ignored this Court's ruling in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), that the preemption provision of ERISA, § 514(a) is "deliberately expansive" in its coverage and "designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life, supra*, at 46.

In addition, the Court of Appeals failed to consider how this Court has interpreted the "relate to" requirement of ERISA, § 514(a). See *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), holding that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-97.)

Finally, the Court of Appeals decision was rendered prior to and without the guidance of this Court's recent decision in *Ingersoll-Rand Company v. McClendon*, 59 U.S.L.W. 4033 (U.S. Dec. 3, 1990). In *Ingersoll-Rand*, this Court considered an employee's claim that his employment had been terminated four months short of the vesting of his pension and that a principal reason for his termination was the company's desire to avoid making contributions to his pension fund. Although plaintiff brought his action under Texas state law, this Court determined that such claim was preempted by ERISA.

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a case decided by the same circuit subsequent to *Perry*. In *Davis* the Sixth Circuit recognized that under *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) state causes of action seeking benefits under ERISA-covered plans are preempted by federal law, see 887 F.2d at 696.

This Court rejected McClendon's argument that the pension plan was irrelevant to his state law action because all that was at issue was his employer's improper motive. Rather, this Court explained that "[t]he argument misses the point, which is that under the Texas court's analysis there simply is *no* cause of action if there is no plan." *Ingersoll-Rand*, *supra*, at 4035. Similarly in considering Duerr's claims, without the VTEP there would be no claim.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION IN A MANNER THAT CONFLICTS WITH THIS COURT'S HOLDINGS AND WITH DECISIONS RENDERED BY OTHER CIRCUITS.

A. The Court of Appeals' holding that a suit for benefits under a severance pay plan does not "relate to" an ERISA-covered employee benefit plan and thus is not preempted by federal law conflicts with recent decisions of this Court and with decisions of other Circuits. In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), this Court considered whether New York's Human Rights Law and Disability Benefits Law was preempted by ERISA. In *Shaw* this Court observed that "[i]n deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue. 'Pre-emption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." ' *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)." *Shaw*, *supra*, at 95.

In interpreting the "relate to" clause contained in ERISA § 514(a), 29 U.S.C. § 1144(a), this Court in *Shaw* held that "[a] law 'relates to' an employee benefit

plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw, supra*, at 96-97. See also *FMC Corporation v. Holliday*, 59 U.S.L.W. 4009, 4011 (U.S. Nov. 27, 1990) (This Court, relying on *Shaw, supra*, concluded that ERISA preempts application of Pennsylvania's antisubrogation statute to FMC's health care plan because such statute "relates to," i.e., "has a reference to," an ERISA-covered employee benefit plan.) Similarly in *Ingersoll-Rand v. McClendon, supra*, this Court considered whether a state law claim of intentional interference with the vesting of a pension benefit was preempted by provisions of ERISA. This Court reiterated that such determination must be based on Congressional intent:

> We must decide whether these provisions, singly or in combination, pre-empt the cause of action at issue in this case. "[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. 'The purpose of Congress is the ultimate touchstone.'" *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (internal quotation omitted) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute. See *FMC Corp. v. Holliday*, 498 U.S. ——, —— (1990) (slip op., at 3), (citing *Shaw v. Delta Airlines, Inc., supra*, at 95)

59 U.S.L.W. at 4034. This Court further observed that ERISA's preemption clause, section 514(a), was conspicuous for its breadth. "Its deliberately expansive language was 'designed to "establish pension plan regulation as exclusively a federal concern"' *Pilot Life, supra*, at 46 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981))." *Ingersoll-Rand, supra*, at 4034-35.

> "The key to § 514(a) is found in the words 'relate to.' Congress used those words in their broad sense, rejecting more limited preemption language that would have made the clause 'applicable only to State

> laws relating to the specific subjects covered by ERISA.' *Shaw, supra,* at p. 98. Moreover, to underscore its intent that § 514(a) be expansively applied, Congress used equally broad language in defining the 'State law' that would be preempted. Such laws include 'all laws, decisions, rules, regulations, or other State action having the effect of law.' § 514(c)(1), 29 U.S.C. § 1144(c)(1)."

Ingersoll-Rand, supra, at 4035.

Under this rationale this Court unanimously found that the state law claim of unlawful interference with attainment of a pension benefit was preempted by federal law. Similarly, Duerr's state law claims are preempted by federal law.

The court of Appeals for the Seventh Circuit in *Lister v. Stark*, 890 F.2d 941 (7th Cir. 1989), *cert. denied*, 59 U.S.L.W. 3420 (1990), considered Lister's claim that he returned to employment at Sun Electric based on a promise to provide him additional pension credited service. When such additional service was not provided, Lister filed suit seeking entitlement to such service. The Seventh Circuit, relying on *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), ruled that the case was properly removed to federal court and further concluded that, because ERISA's civil enforcement provisions provided the exclusive remedy to plan participants seeking additional benefits, such claims arose exclusively under federal law. In considering Lister's argument that ERISA provided no remedy because the federal Act did not contemplate oral modifications to written benefit plans, the court observed:

> While our holding here will leave Lister without a remedy, the availability of a federal remedy is not a prerequisite for federal preemption. The Supreme Court has specifically rejected such an argument. "The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the

> federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under State law that Congress rejected in ERISA." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), See also *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 n. 4 (1987) (rejecting a Ninth Circuit suggestion that a federal remedy is a prerequisite to preemption).

890 F.2d at 946

The Court of Appeals for the Fifth Circuit in *Lee v. E.I. Dupont de Nemours and Company*, 894 F.2d 755 (5th Cir. 1990), considered claims almost identical to those presented by Duerr. Six former employees of Dupont retired under the corporate retirement plan with reduced benefits after allegedly being assured that Dupont would offer no retirement enhancements which could act to increase their benefits. One month after their retirement Dupont adopted an Early Retirement Opportunity which would have increased benefits. Plaintiffs state court action alleged only state law claims of fraud and negligent misrepresentation and sought to recover additional monthly retirement benefits and exemplary damages.

The Fifth Circuit, relying on this Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), found that "[p]reempted state law includes any state cause of action that relates to an employee benefit plan, even if the action arises under general state law that in and of itself has no impact on employee benefit plans." *Lee, supra*, at 756.

Further the Fifth Circuit rejected plaintiffs' argument that the scope of preemption should turn on whether ERISA provided plaintiffs a remedy; if not, then plaintiffs should be allowed to pursue their state remedies. In rejecting this theory the court relied on its two prior decision, *Degan v. Ford Motor Company*, 869 F.2d 889 (5th Cir. 1989) and *Cefalu v. B.F. Goodrich Co.*, 871

F.2d 1290 (5th Cir. 1989): "As in *Cefalu* and *Degan*, the present plaintiffs seek to recover benefits to which they would have become entitled but for a misrepresentation by their employer, during their employment, on which they relied to their detriment. In both *Cefalu* and *Degan*, we held that ERISA preempted such state law claims, despite the fact that ERISA itself provided no remedy for the alleged misrepresentation." *Lee, supra*, at 757.

In *Phillips v. Amoco Oil Company*, 799 F.2d 1464 (11th Cir. 1986), the Eleventh Circuit considered the claims of Norgas employees (formerly with Amoco) for pension benefits based on combined Amoco and Norgas service. The complaint included state claims of breach of contract and fraud and various ERISA claims. Compensatory damages were sought against the employers in an amount equal to lost employee benefits. The Eleventh Circuit, affirming the lower court, held that state law claims were preempted by ERISA. Commenting on the claim for damages the Eleventh Circuit observed that "[t]he compensatory damages specifically sought by the employees for the fraud claims are 'compensatory damages in the form of loss of employee benefits, including but not limited to, the value of the following benefits: early retirement, life and health insurance, vacation and a savings plan benefit . . . This request for damages demonstrates that the employees' fraud claim not only 'relates to' an employee benefit plan, but is at its core an ERISA claim." *Phillips, supra*, at 1470.

Similarly, acknowledging that in circumstances where a federal statute preempts state law claims there may be a "gap" in the law or in the remedies available to plaintiffs, the Eleventh Circuit explained:

> The employees protest that to hold that ERISA preempts this fraud claim, while also holding that ERISA does not prohibit the wrong the employees feel they have suffered leaves a "gap" in the law.

> That is exactly the result that obtains when Congress determines that federal law should govern a broad area to the exclusion of state regulation and chooses not to prohibit actions formerly prohibited by state law. It is the very conflict between the federal scheme and state law that is to be avoided through preemption. To argue that Congress has created a "gap" in the law does not undermine the reasoning on which a finding of preemption is based.

799 F.2d at 1470

This same result necessarily attached in *Pilot Life Ins. Co. v. Dedeaux, supra.* Dedeaux instituted a state law action against Pilot Life claiming tortious breach of contract, breach of fiduciary duties and fraud in the inducement. Damages were sought for mental and emotional distress, punitive damages and exemplary damages in amounts far in excess of the benefits payable under the disability insurance policy. This Court confirmed that under Mississippi law such extra-contractual damages were available to a plaintiff who suffered from a denial of an insurance claim attended by some intentional wrong, see *Pilot Life, supra,* at 49. Nevertheless, this Court, adopting the view of the Solicitor General for the United States, found that Congress clearly had expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants asserting claims for benefits, and concluded that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress. *Pilot Life, supra,* at 52. Thus, necessarily, remedies and damages available to plaintiffs under state law would not be available in circumstances where federal law preempts state law causes of action.

In contrast, the Court of Appeals below in *Duerr,* relying on *Perry* v. *P*I*E Nationwide, Inc.,* 872 F.2d 157 (6th Cir. 1989), *cert. denied,* 110 S.Ct. 1166 (1990) con-

cluded that the lack of a federal remedy was a key factor in denying preemption. In *Perry* the court noted: "We are disposed, however, toward the reasoning of *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.) *cert. denied*, 454 U.S. 968 (1981), that preemption should apply to a state law claim only if Congress has provided a remedy for the wrong or wrongs asserted."[5] *Perry*, *supra*, at 162. Nevertheless, the Court in *Perry* acknowledged that a split of authority existed among the circuits: "It may be seen that there is a respectable authority for positions taken by both parties in this case concerning preemption of state common law claims of fraud, misrepresentation and promissory estoppel. This Court has not previously ruled on the issue." *Perry*, *supra*, at 162.

The Court of Appeals below expanded the holding in *Perry* by applying a three-factor test, *infra*, at p. 5a, in determining whether a federal statute preempts state law claims. Further, the Court of Appeals below made no reference to *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689 (6th Cir. 1989), a Sixth Circuit case also decided subsequent to *Perry*.

In *Davis* plaintiff, in pursuing benefits under an ERISA-covered benefit plan, had sought to include a state law claim of equitable estoppel and also sought extra-contractual compensatory and punitive damages. The Sixth Circuit, in affirming the district court's denial of such claims, observed: "Finally, the Supreme Court has held that causes of action based on state common law are preempted by section 514(a) of ERISA, 29 U.S.C. § 1144(a). *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). The relevant statute states that ERISA su-

[5] In *Ingersoll-Rand*, *supra*, at 4035-36, this Court rejected the notion that preemption might not be present where the federal statute provides no remedy: "Allowing state based actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through § 514."

persedes 'any and all state laws in so far as they relate to any employee benefit plan . . .' Clearly, an equitable estoppel claim would be a state law claim. As such under this most recent Supreme Court pronouncement, such a claim would be preempted." *Davis, supra*, at 696.

In summary, the three-factor analysis applied by the Sixth Circuit (whether federal law provides plaintiff a remedy, whether damages are being sought under the plan, and whether the claim implicates the administration of the plan) conflicts with both decisions of this Court and other Circuit Courts and fails to recognize that in determining whether preemption applies Congressional intent is the touchstone.

B. The importance of resolving the conflict between the Sixth Circuit decision below and decisions of this Court and other circuits is highlighted by the Sixth Circuit's confusion over this Court's decisions in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) and *Ingersoll-Rand v. McClendon*, 59 U.S.L.W. 4033 (U.S. Dec. 3, 1990). In these decisions this Court articulated consistently the breadth of the ERISA preemption clause and focused on the intent of Congress, as expressed in the statutory language and its legislative history. The legislative history under ERISA confirms that, subject to certain narrow exceptions not relevant here, Congress intended to preempt all state laws relating to employee welfare benefit plans.

In *Ingersoll-Rand v. McClendon, supra*, in considering a similar allegation that defendant interfered with the attainment of a benefit, this Court confirmed the strength and breadth of ERISA preemption:

> "We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan. Nor is the cost of defending this lawsuit a mere administrative burden. Here, the existence of a pen-

> sion plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but the essence of the pension *plan* itself.

59 U.S.L.W. at 4035.

This Court emphasized that Congress intended federal uniformity in the administration of employee benefits by the enactment of ERISA:

> The conclusion that the cause of action in this case is preempted by § 514(a) is supported by our understanding of the purpose of that provision. Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries. *FMC Corp.*, 498 U.S. at —— (citing *Fort Halifax*, 482 U.S. at 10-11); *Shaw*, 463 U.S. at 105, and n.25. Allowing state based actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through § 514(a). Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.

59 U.S.L.W. at 4035-36.

Recently the District Court in *Isaac v. Life Investors Insurance Co.*, 749 F. Supp. 855 (E.D.Tenn. 1990) commented on the confusion regarding ERISA preemption of state law claims:

> "This Court is, therefore, left in a quandry. On the one hand, the Eleventh Circuit, from whence this case arrived, has clearly and explicitly ruled that the plaintiffs' state law causes of action are preempted by ERISA. See *Farlow v. Union Central Life Ins. Co.*, 874 F.2d 791 (11th Cir. 1989). On the other hand the Sixth Circuit, where the case is presently pending, has set forth what appears to be conflicting opinions. In *Coleman* [*v. General Elec. Co.*, 643 F. Supp. 1229 (E.D.Tenn. 1986) *affirmed* 822 F.2d 59 (6th Cir. 1987)], this Court found the plaintiffs' state law causes of action to be preempted by ERISA, and then ruled that the plaintiffs had no remedy under ERISA. . . This ruling was affirmed by the Sixth Circuit, which adopted this Court's opinion. However, in *Perry*, the Sixth Circuit thereafter ruled that the courts should consider whether a remedy under ERISA exists before ruling that state law causes of action are preempted by ERISA."

Isaac, supra, at 862-63.

As this District Court pointed out, a clear conflict exists among the circuits and even in the Sixth Circuit itself. Such conflict regarding an issue of significance should be resolved by this Court.

C. The conflict between the Sixth Circuit decision below with this Court's decisions and with those of other circuits requires this Court's resolution because of the unusual public importance of the question presented. As this Court is aware, employee benefit plans cover many millions of workers whose interests are protected by ERISA. Because of the importance which Congress attached to the preemption of state law when enacting ERISA, and also because ERISA is a "comprehensive and reticulated statute" adopted by Congress after careful study (*Alessi v. Raybestos-Manhattan*, 451 U.S. 504, 510 (1981)), it is virtually inconceivable that Congress meant that plaintiffs should be entitled to litigate benefit claims under state law.

Since passage of ERISA, litigation involving thousands of federally regulated employee welfare benefit plans has been initiated. If employers are subject to having claims determined under varying state laws, they will be subject to burdensome and costly state judicial proceedings which will severely hamper their efforts to maintain uniform and equitable benefits for their workers. Multistate employers such as General Motors, which sponsor employee benefit programs that apply across state boundaries, need assurance that their programs will be governed by a single set of laws, rather than by varying rules declared by courts in 50 different jurisdictions. To subject employee welfare benefit plans to the threat of conflicting and inconsistent state court decisions would almost certainly result in piecemeal regulation of such plans; and authoritative resolution of important ERISA questions will be postponed and hindered.

Because the decision of the Court of Appeals seriously undermines the system of remedies provided by Congress under ERISA and because it is certain to generate serious confusion in a large number of cases involving claims for benefits under ERISA-covered benefit plans, this Court should grant the petition and resolve the conflict with its own decisions and with decisions of other circuits.

II. THE DECISION OF THE COURT OF APPEALS IS PLAINLY IN ERROR AND SHOULD BE REVERSED.

A. The Court of Appeals' decision, establishing three factors that must be considered in determining whether claims are preempted by federal law, fails to recognize Congressional intent, cannot be reconciled with the language of the Statute and ignores the holding in decisions of this Court.

Section 514 of ERISA preempts all state laws relating to employee benefit plans. As this Court emphasized in

Pilot Life, supra, "In both *Metropolitan Life, supra*, and *Shaw v. Delta Airlines, Inc., supra*, 463 U.S. at 96-100, we noted the expansive sweep of the pre-emption clause. In both cases '[t]he phrase "relate to" was given its broad common sense meaning, such that a state law "relate[s] to any benefit plan" in the normal sense of the phrase, if it has any connection with or reference to such a plan.'" *Pilot Life, supra*, at 47.

The preemption provisions of ERISA, section 514, constitute the occupation of an entire field of law to the exclusion of any state law, and implies a special concern on the part of Congress for uniform federal regulation of a field covered by ERISA.

In view of the broad preemptive thrust of Section 514, it follows that an action brought by a participant or beneficiary to recover benefits under an employee benefit plan is an action that arises exclusively under Federal law. In these circumstances it makes no difference that the governing federal law is not readily discernible on the face of the Complaint or that the complaint attempts to rely on state law. As this Court has explained in *Pilot Life, supra*, at 56, the legislative history of ERISA demonstrates that the preemptive force of § 502(a) was modeled after § 301 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185. ERISA actions for recovery of benefits arise "under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947," see H.R. Conf. Rep. No. 93-1280, p. 327 (1974), U.S. Code Cong. & Admin. News 1974, pp. 4639, 5107. Thus ERISA's legislative history gives clear indication that Congress intended to make ERISA's civil enforcement scheme exclusive.[6]

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[6] In *Pilot Life, supra*, at 55, this Court commented regarding actions under LMRA § 301:

> Congress was well aware that the powerful pre-emptive forces of § 301 of LMRA displaced all state actions for violations of

B. The Court of Appeals' opinion also fails to come to grips with the legislative history of ERISA. That history reveals a Congressional mandate for the development of a body of federal substantive law by the courts to deal with issues involving rights and obligations under private welfare and pension plans. As explained by Rep. Dent, the Chairman of the Subcommittee on Labor of the House Labor and Education Committee: "I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority of the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." 120 Cong. Rec. 29197 (1974), cited with approval in *Pilot Life Ins. Co.*, *supra*, at 46. The legislative history clearly demonstrates that Congress, in enacting ERISA, intended to replace the conflicting system of state and local regulation of employee benefit plans with a "uniform source of law" for evaluating the conduct of plan administrators. Introductory Statement of Sen. Javits on S. 1557, reprinted in 1 *Legislative History of ERISA* 273, 279 (1973); accord, 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams); *id.* at 29197 (remarks of Rep. Dent). In so acting, Congress sought to enable fiduciaries administering multi-state plans to "predict the legality of proposed actions without the necessity of reference to varying state laws." H.R. Rep. No. 93-533, 93 Cong., 1st Sess. 12 (1973), reprinted in 2 *Legislative History of ERISA* 2359; see also 120 Cong. Rec. 29942 (1974) remarks of Sen. Javits).

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contracts between an employer and a labor organization, even when the state action purported to authorize a remedy unavailable under the federal provision. Section 301 pre-empts any "state law claim [whose resolution] is substantially dependent upon the analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S., at 220, 105 S.Ct. at 1916.

As explained by Sen. Williams, the Chairman of the Committee on Labor and Public Welfare from which ERISA emanated, both the "substantive' and "enforcement" provisions of ERISA were designed to supersede state law:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulation, thus eliminating the threat of conflicting or inconsistent State and local regulation of employe benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof which have the force or effect of law.

120 Cong. Rec. 29933 (1974).

In the words of Senator Javits, one of the two principal Senate sponsors of ERISA, "[i]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (1974). Senator Williams, the other principal Senate sponsor of ERISA, likewise emphasized that suits involving claims for benefits "will be regarded as arising under the laws of the United States, in similar fashion to those brought under Section 301 of the Labor Management Relations Act." *Id.* at 29933.

In sum, as pointed out by the Conference Report which immediately preceded enactment of ERISA, "suits to enforce benefit rights under the plan or to recover benefits under the plan" arise under *federal* law. H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 327, reproduced in 3 U.S. Code Cong. & Admin. News 5038, 5107 (1974).

C. This Court's subsequent decision in *Ingersoll-Rand v. McClendon*, *supra*, requires reversal of the Sixth Circuit decision below. In *Ingersoll-Rand*, plaintiff alleged

that his employer's action in terminating his employment was done with the intent of precluding him from vesting in his pension benefits. Although the Texas Supreme Court had recognized such an action as an exception to their at-will employment doctrine, this Court held that because Congress, in enacting ERISA, intended to preempt the field, such state action was preempted by federal law.

In *Pilot Life*, *supra*, and reaffirmed in *Ingersoll-Rand*, this Court explained that remedies set forth at ERISA § 502(a), 29 U.S.C. § 1132(a) and those provided under ERISA § 510, 29 U.S.C. § 1140, were intended to be exclusive:

> "[T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that congress rejected in ERISA. 'The six carefully integrated civil enforçement provisions found in § 502 (a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." 481 U.S. at 54 (quoting *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)).

59 U.S.L.W. at 4036.

The Sixth Circuit below, although referring to conflicting circuit court decisions, attempted to rely on the language of the statute and Supreme Court precedent in interpreting the "relate to" phrase of ERISA § 514(a), see App. A, *infra*, p. 5a. However the Court of Appeals below ignored that this Court had interpreted such pro-

vision in the broadest sense, see *Pilot Life*, supra at 47; *Shaw v. Delta Airlines, Inc., supra*, at 96-97; and *Ingersol-Rand, supra*, at 4035. Further the Court of Appeals failed to examine the legislative history of ERISA which would have evidenced the intent of Congress to preempt the field and provide uniform federal regulation of employee benefits.

The three-factor test to determine whether federal presumption exists, although novel, fails to take into account the intent of Congress in enacting federal legislation. Had the Court of Appeals examined the legislative history of ERISA, it would have been evident that, as this Court has recognized on numerous occasions, ERISA preemption was intended to be expansive. Participants or those claiming to be participants were to be afforded only the remedies provided by the federal statute to the exclusion of state law remedies.

In short, the decision of the Court of Appeals is plainly in error and should be corrected by the Court. The Sixth Circuit embraces a large industrial sector and includes a large number of major employee benefit plans. The confusion created by the Sixth Circuit's decision over ERISA preemption threatens serious injury to Congressional policies in this vital field.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.[7]

Respectfully submitted,

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[7] In view of the Court of Appeals' clearly erroneous decision, it is respectfully suggested that this Court may wish to reverse that decision summarily on the basis of this Court's recent decision in *Ingersoll-Rand Co. v. McClendon*, 59 U.S.L.W. 4033 (U.S. Dec. 3, 1990).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-4072

NORMAN DUERR,
Plaintiff-Appellant,

v.

DELCO PRODUCTS, a division of General Motors,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO

[Filed Aug. 22, 1990]

Before: JONES and NORRIS, Circuit Judges, and TODD, District Judge.*

PER CURIAM. Plaintiff-Appellant Norman Duerr appeals the United States Magistrate's dismissal of state law claims as pre-empted by section 510 of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140 (1988). For the following reasons, we reverse.

I.

Duerr was employed by defendant-appellee Delco Products (a division of General Motors) for ten years

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* The Honorable James D. Todd, District Judge of the Western District of Tennessee, sitting by designation.

prior to leaving on March 31, 1988. For the last three years, Duerr was a salaried employee in a supervisory position. In early 1988, Delco initiated a Voluntary Termination of Employment Plan ("VTEP") for certain hourly employees. Under this Plan, hourly employees could voluntarily terminate their employment in return for a VTEP benefit payment. In late January 1988, Duerr accepted a future position with a McDonnell Douglas office in California. Duerr alleges that on or about February 1, 1988, he requested that his supervisor and his manager at Delco allow him to return to an hourly position to take advantage of the VTEP. Duerr maintains that on February 15, 1988, he was promised that he could return to an hourly position on February 24, 1988. According to Duerr, in reliance upon this promise, he put a down payment on a house in California.

The first two counts of Duerr's complaint requested damages in the amount of $20,000.00 (the amount of the VTEP benefits) under the Ohio state law theories of breach of oral promise and promissory estoppel. The third count alleged that Delco's conduct violated ERISA. In its order, the Magistrate dismissed the state law claims as preempted by ERISA. Specifically, the court ruled that because the claims "relate to" the employee benefit plan, any remedy must be through ERISA. The court also granted summary judgment for Delco on the section 510 claim, ruling that Duerr cannot maintain a suit under section 510 because he is not a "participant or beneficiary" of the VTEP plan. Duerr appeals only the dismissal of the state law claims.

II.

Whether the district court correctly dismissed the claims pursuant to Fed. R. Civ. P. 12(b)(6) is a question of law subject to *de novo* review. *Dugan v. Brooks*, 818 F.2d 513, 516 (6th Cir. 1987). This court must construe the complaint in the light most favorable to

Duerr, accept all of Duerr's factual allegations as true, and determine whether Duerr undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Id.*

Section 514(a) of ERISA provides that: "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." 29 U.S.C. § 1144(a). The Supreme Court has held that the term "relate to" must be given "its broad commonsense meaning, such that a state law 'relates to' a benefit plan 'in the normal sense of the plan, if it has a connection with or reference to such a plan.' " *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) (citations omitted). In *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1166 (1990), a group of employees brought action against their employers for fraudulent inducement in obtaining participation in an employee benefit plan. The *Perry* court noted that the question before it was:

> [w]hether plaintiffs' cause of action for what amounts to a fraudulent procurement of their consent to participate in the SIP is sufficiently *related* to the plan itself, or whether the relation, if any, is "too tenuous, remote, or peripheral a matter to warrant a finding that the [action] 'relates to' the plan[]". . . .

Id. at 160 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100, n.21 (1983) (emphasis in original). With respect to the state law claims for fraud, misrepresentation, coercion, and promissory estoppel, the *Perry* court held that "preemption should apply to a state law claim only if Congress has provided a remedy for the wrong or wrongs asserted." *Id.* at 162. Because there was no ERISA remedy, the court held that the state law claims were not preempted.

The U.S. Magistrate distinguished *Perry* on two grounds. First, he noted that *Perry* specifically stated that the *Perry* plaintiffs were not seeking plan benefits, but were seeking not to be bound as plan participants. *Id.* In contrast, the district court held that Duerr is seeking plan benefits (namely "the $20,000.00 he alleges he would have been paid if he had participated in the VTEP." J. App. at 110. Second, the Magistrate distinguished *Perry* on the ground that Congress has provided a remedy for Duerr's seeking of plan benefits under ERISA.

Duerr contends that these distinctions are erroneous. He first notes that ERISA does not provide a remedy for plaintiffs who are not participants in a covered plan; as the U.S. Magistrate ruled, Duerr had no redress under ERISA since he was not a "participant" under section 510. Next, Duerr contends that he is not seeking plan benefits in his state law claims. He cites *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1505 (9th Cir. 1985), where the court ruled that "although the plaintiff might have been entitled under the state law of fraud to damages equal to the benefits he would have received had he participated in the plan, such damages were not themselves a 'benefit under a plan' . . ." Duerr notes that in *Perry*, the plaintiffs were participants under the plan; as such, they could have brought suit under ERISA. That is why the *Perry* court had to inquire further to determine whether the specific remedies sought by plaintiff were available under 29 U.S.C. § 1132. In the instant case, Duerr maintains that since he is not a participant, he could not bring suit, so the second phase of the inquiry is not necessary.

Delco argues that the proper test for deciding whether a state action is preempted by ERISA is not whether ERISA provides a remedy, but whether the action is sufficiently related to the plan. Delco refers to language in *Perry* which states that the ultimate test of preemption

is the "relates to" standard. Delco notes that even where there is no remedy provided by ERISA, the action may still be preempted if it is related to the plan:

> The employees protest that to hold that ERISA preempts this [state law] claim, while holding that ERISA does not prohibit the wrong the employees feel they have suffered, leaves a 'gap' in the law. That is exactly the result that obtains when Congress determines that federal law should govern a broad area to the exclusion of state regulation and chooses not to prohibit actions formerly prohibited by state law . . . . To argue that Congress has created a 'gap' in the law does not undermine the reasoning on which a finding of preemption is based.

Phillips v. Amoco Oil Co., 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). *See also Lee v. E. I. DuPont de Nemours and Co.*, 894, F.2d 755, 757 (5th Cir. 1990) (plaintiffs attempts to recover plan benefits that they would have been entitled to but for the misrepresentations of employer are sufficiently related to the plan to be preempted by ERISA). Delco maintains that Duerr is attempting to obtain plan benefits and such a claim is sufficiently related to the plan to be preempted by ERISA.

We hold that the language of the statute and the Supreme Court precedent dictate use of the "relates to" standard. However, whether ERISA provides a remedy is one factor to examine in determining the extent to which the claims are related to the plan. *See Perry*, 872 F.2d at 162. Because Duerr is not a "participant," he has no potential remedy under ERISA. In addition, he seeks to recover damages equal to the plan benefits, but the suit does not implicate the administration of the plan, with which ERISA is fundamentally concerned. The *Phillips* case, cited by Delco, is inapposite, and was distinguished in *Perry*. The *Perry* court stated that *Phil-*

ips was "limited . . . to the facts of the case"—namely, an allegation of fraud which "necessarily depends upon an interpretation of the fiduciary duties imposed by ERISA." *Perry*, 872 F.2d at 161 (quoting *Phillips*, 799 F.2d at 1470). In contrast, Duerr's claims do not implicate any of the obligations and duties spelled out in ERISA. Moreover, any damages recovered by Duerr through the state law claims would originate from Delco, not the Delco Plan. Thus, we find that Duerr's claims are not sufficiently related to the plan to be preempted. Finally, we note that Delco's arguments as to the validity of the promissory estoppel and breach of oral promise claims should not be decided for the first time on appeal, but instead should be directed to the state court.

III.

For the foregoing reasons, we REVERSE the decision of the district court and REMAND with instructions to dismiss the case without prejudice to Duerr's right to file suit in Ohio state court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. C-3-88-576

Magistrate Merz

NORMAN DUERR,

Plaintiff,

vs.

DELCO PRODUCTS, A DIVISION OF
GENERAL MOTORS CORPORATION,

Defendants.

DECISION AND ORDER

[Filed Oct. 30, 1989]

This case is before the Court on Defendant's Motion to Dismiss State Law Claims and to Strike Plaintiff's Jury Claims With Regard to Remaining ERISA Claim, (Doc. 13), and Defendant's Motion for Summary Judgment. (Doc. 19).

Plaintiff Norman Duerr ("Duerr") brought this action against Defendant Delco Products, a Division of General Motors Corporation ("Delco") pursuant to Section 510 of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140. Duerr has also made claims for breach of an oral promise and promissory estoppel.

Duerr was employed by Delco for ten (10) years prior to leaving on or about March 31, 1988. Up until three

(3) years before leaving Defendant's employ, Duerr was an hourly employee and for the last three (3) years he was in a supervisory position.

In early 1988, Delco initiated a Voluntary Termination of Employment Plan ("VTEP") for certain hourly employees. Under this Plan, hourly employees could voluntarily terminate their employment in return for a VTEP Benefit payment. The last date an eligible hourly employee could sign up to take advantage of VTEP was February 26, 1988.

Duerr alleges that on or about February 1, 1988, he requested, through his supervisor, Don Van Ausdal, and his manager, Ray Louis, that Delco return him to an hourly position immediately so he could take advantage of VTEP. Duerr alleges that Delco, through Van Ausdal and Louis, requested that he (Duerr) remain in his salaried position until a replacement could be found. Duerr further alleges that on or about February 15, 1988, he was promised, through Van Ausdal and Louis, that he could return to an hourly position on February 24, 1988, so that he could take advantage of VTEP.

Duerr claims that based on the above referenced oral promise, he decided to terminate his employment with Delco and he accepted employment in California beginning April 1, 1988.

Duerr alleges that Delco did not allow him to return to an hourly position on February 24, 1988, thereby breaching its oral promise. Duerr claims that as a result, he could not and did not receive VTEP Benefit payments upon the voluntary termination of his employment.

Duerr alleges further that he reasonably relied on Delco's promise that he could return to an hourly position on February 24, 1988, and that as a result of his reasonable reliance he could not and did not receive payment under VTEP for voluntarily terminating his employment. Duerr alleges that Delco made the above referenced

promise for the purpose of inducing him to remain in his salaried position until February 24, 1988, and that Delco's promise "should be enforced in order to prevent injustices under the doctrine of promissory estoppel."

Finally, Duerr alleges that Delco's conduct constituted discrimination against him for attempting to exercise his potential rights under the provisions of VTEP and that Delco's motive for refusing to let him return to an hourly position was to interfere with the attainment of a right to which he was to become entitled under VTEP, all in violation of Section 510 of ERISA and enforceable under Section 502(a)(3) of ERISA. Duerr claims that Delco's conduct and violation of ERISA were willful, intentional, and done with reckless disregard for his rights.

Duerr demands judgment against Delco for compensatory damages in the sum of $20,000., the VTEP payment he was allegedly denied, consequential and punitive damages in unidentified amounts, attorney fees, prejudgment interest, costs, and litigation expenses. Duerr has also demanded trial by jury on all issues triable by a jury.

I. *Delco's Motion to Dismiss*

In support of its Motion to Dismiss . . . Delco argues that Duerr's breach of oral promise and promissory estoppel claims are preempted by ERISA.

Duerr argues in response that those claims are not preempted by ERISA because the promises were not made in the administration of a benefit plan. Duerr argues that ERISA does not preempt state claims that are only remotely or tenuously related to an employee benefit plan. Finally, Duerr argues that his claims for breach of an oral promise and promissory estoppel should not be preempted because ERISA does not provide a remedy.

Delco argues in reply that since Duerr has alleged that it acted with the intent and purpose of interfering with his rights in VTEP, an ERISA plan, his allegations in-

timately "relate to" an ERISA covered plan and therefore his oral promise and promissory estoppel claims are preempted.

Section 514(a) of ERISA reads in relevant part:

> [T]he provisions of this subchapter . . . shall supersede any and all state laws insofar as they now or hereafter relate to any employee benefit plan . . . .

29 U.S.C. § 1144(a).

The preemption provision in 29 U.S.C. § 1144(a) is broadly construed to encompass any law which "relates to," that is, has a connection with or reference to, an employee benefit plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). State common law causes of action in contract and tort which implicate a covered benefit plan are preempted by ERISA. *See, Pilot Life Ins. Co. v. Dedeaux*, —— U.S. ——, 107 S. Ct. 1549 (1987), *cited in, Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987).

Duerr's state law contract claims (i.e., breach of an oral promise and promissory estoppel) are preempted by ERISA. Duerr recognizes in his own Complaint, (Doc. 1), that his claims arise under ERISA. *See*, Complaint at ¶¶ 15, 19, 21, 22 and 23. Duerr's allegations all have a connection with the VTEP. Stated differently, Duerr claims that Delco's alleged breach of an oral promise and his reliance on the alleged oral promise resulted in his being denied the opportunity to participate in VTEP. Clearly, then, Duerr's state law claims implicate VTEP, a covered plan, and therefore they are preempted by ERISA.

Pilot Life, *supra* and *Varhola*, *supra*, make it clear that the state law claims which ERISA preempts do not have to be claims that arise as the result of the administration of a plan. They merely need to implicate a covered benefit plan as in this case.

Duerr's reliance on *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989) is somewhat misplaced. In *Perry*, the plaintiffs claimed that they had been fraudulently induced into participating in an employee stock investment plan and to accept a wage reduction. The plaintiffs sought recission of the agreement and restitution of the wage reduction. The Court found that the the plaintiffs' fraud, misrepresentation and promissory estoppel claims were not preempted by ERISA because:

> Plaintiffs, unlike the complainants in some of the cases [where state law claims were held preempted], do not seek plan benefits or an increase in plan benefits; rather they seek not to be bound as participants and thus to recoup their wage reductions.

Id. at 162.

In the present case, Duerr seeks plan benefits; that is the $20,000.00 he alleges he would have been paid if he had participated in VTEP.

Perry is also distinguishable in that the Court, citing *Dependable v. Falstaff Brewing Corp*, 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981), determined that preemption should apply to a state law claim only if Congress has provided a remedy for the wrong asserted. The Court, "giving Plaintiffs the benefit of the doubt," was uncertain whether 29 U.S.C. § 1132 provided, under the circumstances of the case before it, "an adequate remedy to redress the wrongs claimed, specifically, recission and refund of wage reductions." *Perry*, 872 F.2d at 162. In the present case, however, Congress has provided for and Duerr seeks enforcement of the terms of VTEP. *See*, 29 U.S.C. § 1132(a)(3).

For all of the foregoing reasons, this Court finds that Duerr's breach of oral promise and promissory estoppel claims are preempted by ERISA. Accordingly, Defendant Delco's Motion to Dismiss Plaintiff Duerr's breach of

oral promise and promissory estoppel claims is well taken and is hereby granted.

II. *Delco's Motion for Summary Judgment*

In support of its Motion for Summary Judgment, Delco argues that Duerr is not a "participant or beneficiary" of the VTEP plan, which is necessary before he can raise a § 510 ERISA claim. Delco also argues that the employee-defendant conduct in this case was not of the type meant to be proscribed by § 510.

Duerr argues in response that he is a participant under the terms of ERISA and therefore he is protected by § 510. Duerr also argues that Delco's conduct was the type of conduct meant to be proscribed by § 510. Specifically, Duerr argues that Delco discriminated against him by denying him a transfer for the sole reason of preventing his participation in VTEP.

In reply, Delco argues that it was not obligated to act affirmatively act in such a way as to make Duerr eligible for benefits to which he was not otherwise entitled.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. On a motion for summary judgment, the movant has the burden of showing that there exists no genuine issue of material fact, and the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). Nevertheless, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* facts." *Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 247-48. (emphasis in original).

Moreover, although summary judgment must be used with extreme caution since it operates to deny a litigant his day in court, *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir.), *cert. dismissed*, 444 U.S. 986 (1979), the United States Supreme Court has recently stated that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Section 510 of ERISA reads in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for . . . the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140.

Participants are those employees who are or may become eligible to receive a benefit from an employee benefit plan. *Central States, Southeast, and Southwest Areas Pension Fund v. CRSI, Inc.*, 641 F.2d 616, 619 (8th Cir. 1981), *overruled on other grounds, Robbins v. Prosser's Moving & Storage*, 700 F.2d 433 (8th Cir. 1983), *aff'd sub nom. Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984). Non-covered employees, that is, those employees who are not 'employed under the terms and conditions of a Collective Bargaining Agreement,' neither are nor can be participants or beneficiaries. *Central States*, 641 F.2d at 619.

There is no dispute that the VTEP was implemented for certain hourly employees and that at the time it was implemented Duerr was not an hourly employee. It is

clear, then, that Duerr, as a salaried and not an hourly employee, was not eligible to participate in VTEP.

Duerr argues, however, that Delco discriminated against him in violation of § 510 of ERISA when it failed to honor his request to be transfered to an hourly position so that he could participate in VTEP. Presumably, Duerr's position is that Delco interfered with a right (VTEP participation) to which he *may* have become entitled. It appears, then, that Duerr's claim is that Delco was required to do something affirmative (i.e., transfer him to an hourly position) and because it did not, it violated § 510 of ERISA.

There is simply no support for Duerr's position.

In order for there to be a violation of section 510 of ERISA, the discrimination complained of must affect the individual's employment relationship in some substantial way. *West v. Butler*, 621 F.2d 240, 245-46 (6th Cir. 1980). The refusal to act in an affirmative manner, even though the refusal may result in the deprivation of benefits, does not constitute a violation of section 510. *Cf. Garavuso v. Shoe Corp. of America Industries, Inc.*, 709 F. Supp. 1424 (S.D. Ohio 1989).

In the present case, Delco's failure to transfer Duerr from salaried to hourly status did not affect his employment relationship in any way—substantial or otherwise. Delco did nothing to interfere with Duerr's employment relationship—it simply maintained it. Of course, if Delco had somehow been able to transfer Duerr *from* hourly *to* salaried for the purpose of preventing him from participating in VTEP, then there would conceivably be a § 510 violation. However, that was not what occurred here. Duerr was not eligible to participate in VTEP and Delco had no obligation to act affirmatively to make Duerr eligible. Delco's activities—or lack of activities—did not rise to the level of a § 510 violation.

Accordingly, this Court finds that Plaintiff Duerr was not a participant or beneficiary of a covered plan and he

therefore may not raise a § 510 ERISA claim. This Court further finds that assuming *arguendo* Plaintiff Duerr could properly raise a § 510 ERISA claim, the conduct of Defendant Delco about which Duerr complaints was not a § 510 violation.

For all of the foregoing reasons, Defendant Delco's Motion for Summary Judgment is well taken and is granted.

Defendant Delco's Motion to Strike Plaintiff Duerr's Jury Claims is moot.

IT IS THEREFORE ORDERED THAT:

1. Plaintiff's state claims for breach of oral promise and promissory estoppel are dismissed as preempted by ERISA;
2. Judgment be entered in favor of Defendant and against Plaintiff on Plaintiff's ERISA claims; and
3. Defendant's Motion to Strike Plaintiff's Jury Claims is denied as being moot.

October 30, 1989

/s/ Michael R. Merz
MICHAEL R. MERZ
United States Magistrate

Copy to:

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APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case Number C-3-88-576

NORMAN DUERR,

Plaintiff,

v.

DELCO PRODUCTS, A Division of General Motors Corporation,

Defendant.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Judgment is entered in favor of the Defendant Delco Products and against the Plaintiff Norman Duerr on Plaintiff's ERISA claims;

that the Plaintiff's state claims for breach of oral promise and promissory estoppel are dismissed with prejudice as preempted by ERISA; and

that Defendant Delco Product's Motion for Summary Judgment is GRANTED.

Date: October 30, 1989

KENNETH J. MURPHY
Clerk

/s/ [Illegible]
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-4072

NORMAN DUERR,
Plaintiff-Appellant,

v.

DELCO PRODUCTS, a division of General Motors,
Defendant-Appellee.

ORDER

[Filed Nov. 14, 1990]

BEFORE: JONES and NORRIS, Circuit Judges; and TODD, District Judge *

Delco Products has petitioned the Court to rehear its decision of August 21, 1990 reversing the judgment of the district court and remanding with instructions to dismiss without prejudice.

The Court has considered the petition for rehearing offered in support thereof. Finding no issue of law or fact that was overlooked or misapprehented in the substance of the opinion, it is therefore, ORDERED that the petition for rehearing is denied.

However, as we find that plaintiff's state law claims were before the district court pursuant to the court's di-

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* Honorable James D. Todd, United States District Judge for the Western District of Tennessee, sitting by designation.

versity jurisdiction, we hereby modify our prior judgment remanding these claims for dismissal and REMAND these claims to the district court for consideration on the merits.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX E

The provisions of ERISA Section 2, 3(1), and 4, 29 U.S.C. §§ 1001, 1002(1), and 1003, are set forth below:

Sec. 2. (a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees

and their beneficiaries have been deprived of anticipated benefits; and that it is therfore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

Sec. 3. For purposes of this title:

(1) The terms "employee welfare benefit plans" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or

vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

* * * *

Sec. 4. (a) Except as provided in subsection (b) and in sections 201, 301, and 401, this title shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this title shall not apply to any employee benefit plan if—

(1) such plan is a governmental plan (as defined in section 3(32));

(2) such plan is a church plan (as defined in section 3(33)) with respect to which no election has been made under section 410(d) of the Internal Revenue Code of 1954;

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 3(36)) and is unfunded.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-88-576

NORMAN DUERR
310 South Jefferson St., Apt. 21H
Placenba, California 92670,
Plaintiff

v.

DELCO PRODUCTS
A DIVISION OF GENERAL MOTORS CORP.
P.O. Box 1042
Dayton, Ohio 45401,
Defendant

COMPLAINT AND JURY DEMAND

[Filed Nov. 14, 1988]

1. This is an action for breach of an oral promise and promissory estoppel and also under Section 510 of the Employment Retirement Income Security Act (ERISA) 29 U.S.C. Section 1140.

2. The breach of oral promise and injustice under the doctrine of promissory estoppel were committed within the State of Ohio, Montgomery County.

3. Delco Products (Defendant herein) is a division of General Motors Corporation, a corporation duly organized and existing under the laws of the State of Delaware and having its principle place of business in Michigan.

4. Norman Duerr is a resident of the State of California.

5. This court has jurisdiction over this claim based on the diversity of citizenship of the parties and the amount in controversy under 29 U.S.C. § 1332 and under ERISA 29 U.S.C. Section 1132.

6. Plaintiff Norman Duerr was employed by Defendant for ten years prior to leaving the Company on or about March 31, 1988.

COUNT I

7. For the three years immediately proceeding 1988 Plaintiff held a supervisory position with Defendant. Previously he had been an hourly employee.

8. In early 1988 Defendant initiated a voluntary Termination of Employment Plan (VTEP herein) for certain hourly employees. Under this Plan hourly employees could voluntarily terminate their employment and in return receive a VTEP Benefit payment.

9. The last date an eligible hourly employee could sign up to take VTEP was February 26, 1988.

10. Plaintiff wanted to take advantage of Defendant's VTEP offer to terminate his employment with Defendant.

8. Plaintiff requested of Defendant, through his supervisor Don Van Ausdal, and his manager Ray Louis, to return to an hourly position immediately so he could take advantage of VTEP. This request occurred on or about February 1, 1988.

11. Defendant, through the above named management personnel requested that Plaintiff remain in his salaried position until a replacement could be found.

12. On or about February 15, 1988 Plaintiff was promised by Defendant, through the above named management personnel, that he could return to an hourly rated position on February 24, 1988 in order to take VTEP.

13. Based on the above mentioned oral promise Plaintiff decided to terminate his employment with Defendant and accepted employment in California beginning April 1, 1988 and made plans to relocate to California.

14. Defendant breached its oral promise, made through the above named management personnel, by not allowing Plaintiff to return to an hourly position on February 24, 1988.

15. As a result of not being allowed to return to his bargaining unit position on February 24, 1988, Plaintiff could not and did [sic] receive VTEP payments upon the voluntary termination of his employment.

COUNT II

PROMISSORY ESTOPPEL

16. All the allegations of paragraphs 1 through 13 are included herein.

17. Plaintiff reasonably relied on Defendant's promise that he could return to an hourly position on February 24, 1988, and did not return to his bargaining unit position prior to February 24, 1988.

18. Plaintiff was not allowed to return to his hourly rated position on February 24, 1988.

19. As a result of Plaintiff's reasonable reliance on Defendant's promise, Plaintiff could not and did not receive payment under VTEP for voluntarily terminating his employment.

20. Defendant made the above mentioned promise for the purpose of inducing Plaintiff to remain his salaried position until February 24, 1988, and the promises of Defendant should be enforced in order to prevent injustice under the doctrine of promissory estoppel.

COUNT III

SECTION 510 ERISA

21. The allegations of paragraphs 1-20 are included herein.

22. Defendant's conduct as aforesaid constituted discrimination against Plaintiff for attempting to exercise his potential rights under the provisions of VTEP. Defendant's motive for refusing to let Plaintiff return to an hourly position was for the purpose of interfering with the attainment of a right to which Plaintiff was to become entitled under VTEP, all in violation of Section 510 of ERISA and enforceable under Section 502(a)(3) of ERISA.

23. As a proximate result of Defendant's oral promise and Plaintiff's reasonable reliance on said promise and Defendant's violation of ERISA, Plaintiff was denied a VTEP payment for the voluntary termination of his employment and also suffered consequential damages.

24. Defendant's conduct and violation of ERISA was willful, intentional, and done with reckless disregard for Plaintiff's rights.

PRAYER

Wherefore Plaintiff demands judgment against the Defendant as follows:

1. For compensatory damages in the sum of the VTEP payment denied Plaintiff $20,000.
2. For consequential damages
3. For punitive damages
4. For attorney's fees under ERISA.
5. For prejudgment interest on all amounts claimed.
6. For trial by jury on all issues trialable [sic] by a jury.

7. For costs, litigation expenses and such additional relief as the Court deems just and proper.

Respectfully submitted,

/s/ Paul H. Tobias
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(513) 241-8137
Attorney for Plaintiff

APPENDIX G

The affiliates and non-wholly owned subsidiaries of petitioner General Motors Corporation are:

Company (Country of Incorporation in Parentheses)

ACCSCO S.A. (Belgium)
ACE Limited (Cayman Islands)
AMBRAKE Corporation (USA)
AMRAAM International Licensing Company (USA)
AeroVironment, Inc. (USA)
Alliance Development Corporation (USA)
American Manufacturing Systems, Inc. (USA)
American Mobile Satellite Consortium, Inc. (USA)
Applied Intelligent Systems, Inc. (USA)
Aralmex, S.A. de C.V. (Mexico)
ARINC Incorporated (USA)
Asset Leasing GmbH (West Germany)
Atlantic Satellites Ltd. (Ireland)
Aura s.r.l. (Italy)
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador)
Avicom International, Inc. (USA)

Banque de Credit General Motors (France)
Behaviortech, Inc. (USA)
Beijing International Information Processing Company Limited (Peoples Republic of China)
British Caledonian Flight Training Limited (England)
Bujias Mexicanas, S.A. de C.V. (Mexico)

CAMI Automotive, Inc. (Canada)
CEI Co., Ltd. (USA)
Calsonic Harrison Co., Ltd. (Japan)
Carus Grundstucks-Vermietungsgesellschalt mbH & Co. Object Kuno 65 KG (Federal Republic of Germany)
Carus Grundstucks-Vermietungsgesellschalt mbH & Co. Object Leo 40 KG (Federal Republic of Germany)

China Management Systems Corporation (China)
Cilva Holdings Plc. (England and Wales)
Cimflex Teknowledge (USA)
Coalition Undertaking Remedial Efforts, Inc. (USA)
Comau Productivity Systems, Inc. (USA)
Compagnie de Faisceaux Tunisian International S.A. (Tunisia)
Compania Nacional de Direcciones Automotrices, S.A. de C.V. (USA)
Componentes Delfa, C.A. (Venezuela)
Comtrac Corporation (USA)
Constructora Venezolana de Vehiculos, C.A. (Venezuela)
Convesco Vehicles Sales GmbH (West Germany)

DHB-Componentes Automotivos S.A. (Brazil)
Daewoo Automotive Components, Ltd. (Korea)
Daewoo Motor Co., Ltd. (Korea)
Data Services America, Inc. (USA)
Delkor Battery Company, Ltd. (Korea)
Detroit Diesel Corporation (USA)
Diavia s.p.A. (Italy)

EDESA Societe Anonyme Holding (Luxembourg)
E.D.S. Federal Services Corporation (USA)
E.D.S.W.-Mexico S.A. De C.V. (Mexico)
ELTRO GmbH (Federal Republic of Germany)
EPEC S.A. (Brazil)
Earth Observation Satellite Company (USA)
ELEKLUFT Elektronik-und Luftfahrtgerate GmbH (Federal Republic of Germany)
Empresa Mixta GEMACVEN, S.A. (Venezuela)
European Components Corporation (USA)

Fabrica Colombiana de Automotores S.A. ("Colomotores") (Colombia)
Federal Integrated Systems Corporation (USA)
First City Corp. (USA)

G & F Company (USA)
GM Allison Japan Limited (Japan)

GMACC Financiera de Colombia S.A. Compania de Financiamiento Comercial (Colombia)
GMAC RF, Inc. (———)
GMFanuc Robotics Canada Ltd. (Canada)
GMFanuc Robotics Corporation (USA)
GMFanuc Robotics Europe GmbH (West Germany)
GMFanuc Robotics Italia S.r.l. (Italy)
GMFanuc Robotics (U.K.) Ltd. (England)
GMFanuc Robotique France S.A.R.L. (France)
General Motors Bankgesellschaft m.b.H. (Austria)
General Motors del Ecuador S.A. (Ecuador)
General Motors Egypt (Arab Republic of Egypt)
General Motors France Automobiles S.A. (France)
General Motors Holdings (U.K.) Limited (England)
General Motors Kenya Limited (Kenya)
Genie Mecanique Zairose, S.A.R.L. (Republic of Zaire)

H & R Company (USA)
HBH Company (USA)
HKV (USA)
Hitachi Data Systems Holding Corporation (USA)
Hughes Data Systems (USA)
Hughes-Kenwood RDSS, Inc. (USA)
Hughes Microelectronics Europa Espana, S.A. (Spain)
Hughes Microelectronics Europa Limited (Scotland)

IBC Vehicles Limited (United Kingdom)
I.K. Coach Co., Limited (Japan)
ITC Inland Teknik Oto Yan Sanayi Sirketi (Turkey)
Ilmor Engineering, Inc. (USA)
Ilmor Engineering, Ltd. (England)
Industries Mecaniques Maghrebines, S.A. (Tunisia)
Industrija Delova Automobila, Kikinda (Yugoslavia)
Infocel, Inc. (USA)
Interactive Entertainment, Inc. (Canada)

International Electro-Optical Industry Anonim Sirketi (Turkey)
Interpractice Systems, Inc. (USA)
Isuzu-General Motors Australia Limited (Australia)
Isuzu Motors Limited

Japan Communications Satellite Company, Inc. (Japan)
Japan Satellite Communications Network Corporation (Japan)

Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Koram Plastics Company, Ltd. (Korea)

MET (USA)
Mecel AB (Sweden)
Metal Casting Technology, Inc. (USA)
Millbrook Pension Management Ltd. (England)

NCRS Holdings Inc. (USA)
National Car Rental Systems, Inc. (USA)
Neodata Holdings, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
New Venture Gear, Inc. (USA)
Nippon Avionics Co., Ltd. (Japan)
Nippon EDS Co., Ltd. (Japan)

ORRCO, Inc. (USA)
Omnibus BB Transportes, S.A. (Ecuador)
Opel-Automobilwerk Eisenach-PKW GmbH (Germany)
Opel-Handler Versicherungsdienst GmbH (Federal Republic of Germany)
Opel-Wohnbau GmbH (West Germany)

P. T. Mesin Isuzu Indonesia (Indonesia)
PDES, Inc. (USA)

Pacific Monolithics, Inc. (USA)
Packard CTA Pty. Ltd. (Australia)
Packard Electric Vas kft (Hungary)
Penske Transportation, Inc. (USA)
Perceptron (USA)
Promotora de Partes Electricos Automotrices (Mexico)

Rediffusion Simulation Tulsa, Inc. (USA)
Residential Funding Corporation (USA)
Robotic Vision Systems, Inc. (USA)
Ruedas de Aluminio, C.A. (Venezuela)

Saab Automobile AB (Sweden)
Senalizacion y Accesorios del Automovil Yorka, S.A. (Spain)
Shinsung Packard Company, Ltd. (Korea)
Sociedad de Comercializacion Internacional Colmotores S.A. (Colombia)
Societe Francaise des Amortisseurs de Carbon S.A. (France)
Soft-Switch, Inc. (USA)
Subaru-Isuzu Automotive, Inc. (USA)
Sung San Company, Ltd. (South Korea)
Suzuki Motor Corporation (Japan)
Systems Technology Management Corporation (Korea)

T.A.D. Communications Company (USA)
T.A.D. Communications Company International (USA)
Tactical Truck Corporation (USA)
Telecommunications Data Service, Incorporated (USA)
Terminales Electricas, S.A. de C.V. (Mexico)
Thomas Group, Inc. (USA)
3DK Limited (United Kingdom)
Transallison S.A. (Brazil)
Truck and Bus Engineering U.K., Limited (USA)

UKADGE Systems Limited (United Kingdom)
Unitech, Inc. (USA)
United Australian Automotive Industries Limited (Australia)
United Motor Manufacturing, Inc. (USA)
Uveral S.A. (Uruguay)

Vanguarda Componentes Automotivas, S.A. (Brazil)
View Engineering, Inc. (USA)
Volvo GM Canada Heavy Truck Corporation (Canada)
Volvo GM Heavy Truck Corporation (USA)

Westcott Communications, Inc. (USA)

Supreme Court, U.S.
FILED
MAR 14 1991
OFFICE OF THE CLERK

No. 90-1267 (2)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

GENERAL MOTORS CORPORATION

Petitioner

vs.

NORMAN DUERR

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

PAUL H. TOBIAS
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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Is a state cause of action which does not implicate the administration of a plan or affect the duties and obligations upon plan administrators, and for which the Employee Retirement Income Act of 1974 (ERISA) does not provide a remedy, so remotely and tenuously related to a plan that it is not preempted.

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COUNTER-STATEMENT OF THE CASE

Respondent, Norman Duerr, filed the claims subject to this Petition under state law to recover damages arising out of Petitioner, General Motor's, breach of its promise to allow him to transfer to an hourly position. As a result of that breach, Duerr was unable to apply for severance payments when he left the employment of General Motors. The District Court dismissed Duerr's state law claims, finding them preempted by ERISA.

ERISA however provides no remedy to Duerr for the breach of that promise because he was not an hourly employee, and therefore not a "participant" in the Company's severance plan. Furthermore, General Motor's promise to return Duerr to an hourly position was not made by plan administrators and did not relate to plan

administration or ERISA in any manner. Finally, Duerr does not seek plan benefits, rather he seeks damages from his employer, for the breach of its promise to return him to an hourly rated position. Under these circumstances, the holding of the Court of Appeals for the Sixth Circuit that Duerr's state claims are so remotely and tenuously related to an ERISA plan that they should not be preempted was proper. It simply makes no sense to preempt state claims leaving plaintiff without a remedy, when those state claims do not impinge upon ERISA's scheme of regulation.

A. THE FACTS

In mid-November of 1987 Respondent, Norman Duerr (Duerr), became aware that Petitioner, General Motors Delco Product's

Division (Delco), was offering a severance pay package called the Voluntary Termination of Employment Plan (VTEP) to the hourly employees in the bargaining unit at its Kettering plant. At that time, Duerr was a salaried supervisor on the second shift at the Kettering Plant, but he had previously been an hourly employee in the bargaining unit. For personal reasons however, Duerr desired to work the first shift. When a position on first shift could not be found for him, Duerr decided to leave Delco and accepted a job in California with the McDonnell Douglas Corporation in January of 1988.

On February 1, 1988, Duerr requested an immediate return to hourly rate so he would be eligible for VTEP benefits when he resigned. Duerr made this request of his General Supervisor and Plant

Superintendent, neither of whom were responsible for the administration of the VTEP. Duerr merely wanted to be sure he could transfer to an hourly position so he would be eligible to apply for the VTEP benefits. In response, Duerr's supervisors offered him a temporary position on first shift. Duerr considered that offer, but he desired a permanent return to first shift and therefore did not change his mind about leaving the company.

Consequently, on February 15, 1988 Duerr went to the office of Pam Pitsenberger, who was in charge of administrating the VTEP. She told Plaintiff that returning to hourly rate was not her area of responsibility and that Duerr should see his supervisors concerning a return to an hourly rated

position. Duerr wanted to be sure there would be no problems in moving to an hourly rated position and therefore being eligible to sign up for VTEP benefits[1], before committing to buying a house in California. Therefore, Duerr spoke with his supervisors that same day, February 15th, about a return to an hourly position. Duerr's supervisors requested that he stay in his supervisor's position as long as possible so they could find a replacement for him, but promised him he could return to an hourly rated position on February 24th. The VTEP expired February 26th. In reliance on his supervisor's promise that he would be returned to an hourly rate on the 24th, Duerr agreed to remain in his supervisor's

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[1] In Duerr's case, he would have been eligible for VTEP severance benefits of $20,000.00 had he been able to return to a hourly position as promised.

position as long as possible and made no further attempts to return to an hourly rated position prior to that date. Also, in reliance on his supervisor's promise, Duerr and his wife went ahead with their plans to place a $2,000.00 down payment on a house in California. Duerr however was not transferred to an hourly rated position on the 24th as promised and was therefore unable to sign up for VTEP benefits.

Duerr filed suit October 30, 1988, in the United States District Court, Southern District of Ohio, Western Division. In his first two counts Duerr alleges that he is entitled under state law to damages resulting from Delco's breach of its promise to return him to an hourly position. Duerr alleged diversity jurisdiction on his first two counts. In

his third count, Duerr alleged that Delco intentionally interferred with the attainment of benefits under §510 of ERISA, 29 U.S.C. §1140. The District Court dismissed Duerr's §510 claim, finding that he was not a participant in the VTEP plan because he was not an hourly employee during the duration of that plan. Therefore the District Court concluded Duerr did not have standing to sue under §510. Plaintiff did not appeal from that dismissal. However, the District Court also dismissed Duerr's state claims, finding they were preempted by ERISA. Duerr appealed the dismissal of his state claims to the Sixth Circuit Court of Appeals, which reversed the District Court's decision.

B. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals held that Duerr's state law claims for breach of oral promise and promissory estoppel were not sufficiently related to the VTEP Plan to be preempted. Citing Perry v. PIE Nationwide, 872 F.2d 157, 162 (6th Cir. 1989) cert denied, 110 S.Ct 1166 (1990). The Court held that whether ERISA provides a remedy is one factor to examine in determining whether a claim is related to an ERISA plan. Because Duerr was not a "participant" in the VTEP, the Court found he had no potential remedy under ERISA.

In addition to finding that ERISA did not provide a remedy to Duerr, the Court also emphasized the fact that Duerr's suit ". . . does not implicate the administration of the plan, with which

ERISA is fundamentally concerned" or " . . . implicate any of the obligations and duties spelled out in ERISA." As the court noted, Duerr was not a participant in the plan. Nor was the promise relied upon by Duerr related to the plan. He was simply promised that he could transfer to an hourly rate.[2] In addition, the promise was made by front line supervisors, not plan administrators or plan fiduciaries. Finally, the Court noted that any damages recovered by Duerr would originate from Delco, not the Delco plan.[3]

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[2] As the Court of Appeals below noted, the promise in question was that Duerr " . . . could return to an hourly position on February 24, 1988."

[3] This fact is important for two reasons. First, it eliminates any risk that Duerr's claim would have an adverse impact on a self funded plan. More importantly, it emphasizes the fact that it was Delco as Duerr's employer, not as plan administrator, which Duerr is seeking to hold liable. Thus even if the VTEP were self funded, Duerr would still only be

The court distinguished Phillips v. Amoco Oil Co., 799 F.2d 1464, 1470 (11th Cir. 1986) cert denied, 481 U.S. 1016 (1987). In Phillips the Court of Appeals for the Eleventh Circuit held that plaintiff's state law claims were preempted even though ERISA did not provide a remedy. In Phillips however, the Court below noted, the employee's state law claim "necessarily depend[ed] upon an interpretation of the fiduciary duties imposed by ERISA" and thus was preempted. App A, infra, p. 69, quoting Phillips, 799 F.2d at 1470. "In contrast" the Court stated, "Duerr's claims do not implicate any of the obligations and duties spelled out by ERISA". Id.

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entitled to damages from Delco, not the Plan.

The Court also carefully analyzed this Court's decisions in both Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) and Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983) in reaching its decision. The opinion is also entirely consistent with this Court's subsequent opinion in Ingersoll-Rand Co. v. McClendon, 59 U.S.L.W. 4033 (US Dec. 3, 1990). In McClendon this Court held that a Texas state cause of action " . . . which makes specific reference to, and indeed is premised on, the existence of pension plan" is preempted by ERISA. Id. at 4035. In the instant case however, the causes of action relied on by Duerr, promissory estoppel and breach of promise, are not premised on the existence of the plan. They are general causes of action without any relationship to the existence

of a plan. Thus the causes of action relied upon by Duerr are more closely akin to the garnishment statute in Mackey v. Lanier Collection v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 (1988), where the Court found no preemption, than it is to the claim in McClendon. Duerr's causes of action, like the statute in Mackey, are generally applicable, make no reference to an ERISA plan, and function irrespective of an ERISA plan. See McClendon, 59 USLW at 4035 (distinguishing Mackey). Indeed, the only relationship between Duerr's causes of action and the VTEP is the fact that Duerr seeks damages he would have been able to obtain had his supervisors not breached their promise.[4]

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[4] In this sense, Duerr's claim is no different than an employee who claims he was unlawfully discharged for reasons unrelated to a ERISA plan (e.g., in breach

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE SIXTH COURT OF APPEALS IS NOT IN CONFLICT WITH THE HOLDINGS OF THIS COURT OR WITH DECISIONS RENDERED BY OTHER COURTS OF APPEALS

A. The Decision Of The Court Of Appeals Is Not In Conflict With The Holdings Of This Court.

This Court has recognized that

> [s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law relates to a plan.

Shaw v. Delta Airlines, 463 U.S. 85 (1983). See also, Mackey v. Lanier Collection Agency & Services, Inc., 486 U.S. 825 (1988), Fort Halifax Package Co.

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of contract, due to his age) but claims lost pension benefits as part of his damages. His cause of action does not rely on the existence of a plan, but his claim for damages does.

v. Coyne, 482 U.S. 1 (1987). Applying this standard, the Court of Appeals found that Duerr's state claims were not sufficiently related to the VTEP to be preempted.

B. The Opinion Of The Sixth Circuit Court Of Appeals Is Not In Conflict With Those Of Other Circuits

The decision of the Court of Appeals is also in accord with the decisions of other circuits. Although the cases cited by Petitioner hold ERISA preemption may apply even if it leaves a plaintiff without a remedy, each one of those opinions involved claims which directly implicated plan administration. In Lee v. E.I. Dupont de Nemours & Co., 894 F.2d 755, 758 (5th Cir. 1990) and Phillips v. Amoco Oil Co., 799 F.2d 1464, 1470 (11th Cir. 1986) plaintiffs sought to place a state created duty upon plan

administrators to disclose the terms of plan amendments. Similarly in Lister v. Stark, 890 F.2d 941 (7th Cir. 1989), Degan v. Ford Motor Co., 869 F.2d 889 (5th Cir. 1989) and Cefalua v. B.F. Goodrich Co., 871 F.2d 1290 (5th Cir. 1989), plaintiffs were trying to enforce oral representations regarding their entitlement to plan benefits. As the Court of Appeals in the instant case pointed out however, Duerr's claim involved neither the administration of a plan nor the duties and obligations placed upon plan administrators. The promise he seeks to enforce is merely that he would be allowed to return to an hourly rated position and has no relation to an ERISA plan. This was a decision made solely in the ordinary course of business. Duerr was well aware that his supervisors had no authority

over the administration of the VTEP. Indeed, Duerr does not rely on a single representation made by a plan administrator or regarding the plan in stating his claim.

The court in Lister v. Stark recognized this same distinction between a claim which implicates the administration of a plan and one which does not when it distinguished Pizlo v. Bethlehem Steel Corp., 884 F.2d 116 (4th Cir. 1989) because it "did not involve an oral modification of a pension plan". Lister 890 F.2d at 945. Pizlo, like Duerr's case, involved state law claims of breach of contract and promissory estoppel based on promises unrelated to the plan. Pizlo, 884 F.2d at 120. Also as in this case, the plaintiffs in Pizlo did not seek plan benefits, but rather their " . . . damages

would be measured in part by the lost pension benefits the Plaintiffs would have received". Id. The court in Pizlo held plaintiffs' state law claims not preempted because they

> . . . would not submit [Defendant] to "conflicting employer obligations and variable standards of recovery", "determine whether any benefits are paid" nor "directly affect the administration of benefits under the Plan". See Sorosky v. Burroughs Corp., 826 F.2d 794, 800 (9th Cir. 1987).

Pizlo, 884 F.2d at 120. The same is true in the instant case. Thus the decision of Seventh Circuit of Appeals in Lister v. Stark explicity recognized that claims such as Duerr's should not be subject to preemption.

In sum, there is no conflict in the circuits.[5] All of the cases cited by Petitioner involve factual circumstances which directly implicate plan administration or the duties and obligations placed upon administrators, unlike the instant case.[6] The Court of Appeals for the Sixth Circuit was well aware of this important fact when it

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[5] Petitioner claims Perry v. PIE Nationwide, recognized such a conflict among the circuits. However, when the court stated in Perry v. PIE Nationwide "It may be seen that there is respectable authority for both positions," it was considering whether fraud, misrepresentation and promissory estoppel in the administration of plan were preempted. Perry, 872 F.2d at 158, 159. Clearly there is no conflict when, as here, the administration of a plan is not involved.

[6] Davis v. Kentucky Finance Cos. Retirement Plan, 887 F.2d 689, 695 (6th Cir. 1989), cited by Petitioner, also involved a plaintiff's promissory estoppel based on actions and representations taken in the administration of the plan and thus is not in conflict with the decision of the Court of Appeals in this case.

distinguished, Phillips v. Amoco and Lee v. E.I. Dupont de Nemous & Co., because they involved the administration of a plan. Lister v. Stark, which Petitioner claims is in conflict with the instant case, recognized the same distinction in distinguishing the Pizlo case. Petitioner attempts to create a false conflict by turning Duerr's case into what is not - a suit to enforce a promise or representation made by plan administrators in the administration of a plan.

Similarly, Petitioner places far too great an importance on the Court of Appeal's consideration of Duerr's lack of a remedy under ERISA as a factor in considering whether his state claims were preempted. The Court merely held that

> . . . whether ERISA provides a remedy is one factor to examine

> in determining the extent to which the claims are related.

The Court below did not hold that a remedy under ERISA was necessary to a finding a preemption. Indeed, it implicitly recognized that state law claims in cases such as Phillips v. Amoco Oil Co., which implicated plan administration, would be preempted even though ERISA did not provide Plaintiff with a remedy.

Petitioner fails to recognize that there is a fundamental difference between a case such as Phillips v. Amoco Oil Co., where Congress has comprehensively set forth the duties of the parties and the remedies available for breaches of those duties, and the instant case where Congress does not even purport to regulate the relationship between the parties. To preempt a plaintiff's state law claim

where Congress has regulated the relationship is consistent with the purpose of maintaining a uniform federal scheme of regulation and it can be reasonably said Congress intended such a gap, i.e. the lack of a remedy. However, to do so where Congress has not regulated the relationship between the parties in any manner, serves no purpose, makes fundamentally no sense, and it cannot be reasonably said such a gap was intended.

All the cases relied upon by Petitioner involved claims which implicated areas comprehensively regulated by ERISA. For example in Lister v. Stark, 890 F.2d 941, 943 (7th Cir. 1989) plaintiff, a participant in a pension plan, sought to enforce a verbal promise that he would be credited for years of service under his pension plan. Clearly

such a promise implicated the administration of defendant's plan. In such a case, it can be reasonably stated Congress intended to preempt plaintiff's claims.

The instant case however is fundamentally different from the cases relied upon by Petitioner. There is absolutely no indication in the instant case that Congress intended a gap in the law, because Congress does not even purport to regulate the relationship between non-participants and employers who are not acting as plan fiduciaries or in the administration of a plan. Under these circumstances, a plaintiff's lack of a remedy under ERISA is evidence that any state law claims he might have are so remotely and tenuously related to ERISA that they should not be preempted. When

the intent of Congress is not in jeopardy of being disrupted, there is no reason to preempt a claim such as Duerr's, leaving a plaintiff without any remedy to redress the wrongs he has suffered. Thus, the decision of the Court of Appeals below is also entirely consistent with Congressional intent" . . . that plan and plan sponsors would be subject to a uniform body of benefit law." Ingersoll-Rand, 59 U.S.L.W at 4035-4036.

C. Duerr Is Not Seeking Plan Benefits In His State Law Claims

Far from the court below being confused as Petitioner suggests, it is Petitioner who is confused. Petitioner is simply wrong in claiming that Duerr is litigating benefit claims under state law which would risk the creation of inconsistent and piecemeal regulation of

employee benefit claims. Duerr is not alleging he is entitled to VTEP benefits, he is simply alleging that he is entitled to damages equal that amount caused by the failure of his employer to return him to an hourly rated position. The same issues were addressed by the Ninth Circuit in Scott v. Gulf Oil Corp.,

> . . . [P]laintiff, having waived participation in the plan, was not a participant or beneficiary . . . [thus] . . . although the Plaintiff might have been entitled under the state law of fraud to damages equal to the benefits he would have received had he participated in the plan, such damages were not themselves a "benefit under a plan" and therefore could not be awarded in an ERISA action.

754 F.2d 1494, 1505 (9th Cir. 1985), (discussing Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc., 721 F.2d 654 (9th Cir. 1983)). See also Matori Bros. Distributors v. Jones-Masengale, 781 F.2d 1349, 1358 (9th Cir. 1986)(damages awarded for injuries suffered due to wrongful exclusion from an ERISA plan . . . not benefits under an ERISA plan"). As in Freeman and Scott, Duerr here is not seeking plan benefits but the value of Delco's broken promises and the consequential damages caused by his detrimental reliance. Indeed, because Duerr was held not to be a participant in the VTEP he has no basis to claim a recovery of plan benefits.

II. THE DECISION OF THE COURT OF APPEALS IS NOT IN ERROR

Contrary to Petitioner's assertion, the Court of Appeals below did not establish a new test to determine whether ERISA preemption exists. It simply considered the facts of Duerr's case and concluded that his state law claims were not sufficiently related to ERISA to be preempted. That holding is entirely consistent with both the rulings of this court and Congressional intent.

Respondent is in complete agreement with Petitioner that the purpose of ERISA preemption is to eliminate "the threat of conflicting and inconsistent state and local regulation" on plan administrators. 120 Cong Rec 29197 (1974), cited with approval in Pilot Life Ins Co., supra at 46, and create a uniform source of law for evaluating the conduct of plan

administrators. Introductory Statement of Sen. Javits on S. 1557, reprinted in I Legislative History of ERISA, 273, 279 (1973). What Petitioner fails to recognize however, is that the instant case does not involve a threat to any of these policies. Contrary to Petitioner's repeated assertions this is not a claim for benefits under an ERISA covered plan. To the contrary, as the Court below recognized, this was an action by a person who was not a participant in a plan against his employer for its failure to keep a promise unrelated to the administration of the plan. Thus the outcome of this case will have absolutely no impact on the administration of an ERISA plan.

As already noted, the decision of the Court of Appeals in the instant case is consistent with this court's decisions in Ingersoll-Rand v. McClendon, Pilot Life, and Shaw.

CONCLUSION

In an attempt to convince this Court to grant a writ of certiorari, Petitioner has cast this case as something it is not, a suit for plan benefits which implicates the administration of a plan and the duties and obligations created by ERISA. Similarly, Petitioner has ignored the difference between the instant case, which did not involve the administration of a plan, and the decisions of other Circuit Courts of Appeal which do implicate the administration of a plan, in order to

create a false conflict between the circuits regarding the affect of a lack of a remedy under ERISA on preemption. In reality, the Court below simply applied this court's "relate to" standard to the instant case, evaluated the particular facts of the case, and found Duerr's state claims so remotely and tenuously related to the plan in question that they should not be preempted.

For the foregoing reasons, Respondent respectfully requests this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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GENERAL MOTORS CORPORATION,
Petitioner,

v.

NORMAN DUERR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

INTRODUCTION

The brief in opposition attempts to minimize the importance of the conflict between the Sixth Circuit decision below and decisions of this Court, as well as the conflict between the Sixth Circuit decision and decisions of other circuits on the question of whether a claim for benefits under an ERISA-covered plan "relates to" such plan and therefore is preempted by federal law. The brief in opposition also ignores the premise that whether a federal statute preempts state law causes of action depends on congressional intent, rather than the three-

factor test adopted by the Sixth Circuit. "The purpose of Congress is the ulitmate touchstone." *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985).

Further, Respondent's attempt to narrow his claim and suggest that he complains only of the employer's failure to return him to an hourly rated position is totally inconsistent with the allegations of the Complaint. Such Complaint indicates that Respondent's *sole* motive in seeking transfer to an hourly rated position was to obtain benefits under GM's Voluntary Termination of Employment Plan, VTEP (Pet. App. 23a, ¶¶ 8-12): "Plaintiff was promised by Defendant . . . that he could return to an hourly rated position . . . *in order to take VTEP.*" (emphasis added) (¶ 12).

Had there been no VTEP there would have been no claim.[1] Respondent's Prayer (Pet. App. 25a) seeks "damages in the sum of the VTEP payment," and "attorney's fees under ERISA." Count III claims unlawful interference with his attainment of a benefit under an ERISA-covered plan in violation of § 510 of ERISA, 29 U.S.C. § 1140 (Pet App. 25a).

Similarly the plaintiff in *Ingersoll-Rand v. McClendon*, 59 U.S.L.W. 4033 (U.S. Dec. 3, 1990) suggested that his claim only concerned the employer's improper motive in terminating his employment. Such contention was rejected by this Court: "[t]he argument misses the point, which is that under the Texas court's analysis there simply is *no* cause of action if there is no plan." *Ingersoll-Rand, supra*, at 4035.

This conflict among the circuit courts imperatively calls for resolution because of the large number of people who are affected. In the United States there are approximately 500,000 private pension plans which cover over

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[1] It is illogical that Respondent sought to be demoted to an hourly position so that he could continue in employment. Rather this was the means he selected to obtain VTEP benefits.

50 million employees. There also are approximately 1.7 million private employee welfare plans,[2] Congress intended to assure uniformity in the administration of these plans by creating federal fiduciary standards. See 29 U.S.C. 1001(b): "It is hereby declared to be the policy of this chapter to protect interstate commerce . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, . . ." By allowing state law to apply to claims for benefits under ERISA-covered employee welfare benefit plans, the Sixth Circuit had defeated that fundamental statutory purpose.

The resulting confusion over ERISA preemption is highly detrimental to the public interest. Neither employees nor employers should be compelled to waste resources in protracted litigation applying varied state laws in resolving claims for ERISA benefits. It is highly prejudicial to employees, who have limited resources, and to employers, who face large numbers of ERISA claims, to be encumbered with such needless burden and expense.

I. RESPONDENT'S CLAIM NECESSARILY ARISES UNDER FEDERAL LAW

Respondent's statement of facts (Opp. 2-7) as well as his complaint (Pet. App. 22a) clearly demonstrate that he seeks only benefits under the VTEP. His prayer for relief included "compensatory damages in the sum of the VTEP payment[3] . . ." and "attorney's fees under

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[2] U.S. Department of Labor, *Pension and Welfare Benefits Programs, Estimates of Participants and Welfare Benefits Programs* 1 (1983); 4 Health and Population Study Center, *Employee Welfare Benefit Plans and Plan Sponsors in the Private Nonfarm Sector in the United States 1978-1979* 24 (1980).

[3] Respondent's suggestion that he seeks no benefit under the plan, but rather an amount equal to such benefit cannot evade ERISA federal jurisdiction. In *Phillips v. Amoco Oil Company*, 799 F.2d 1464 (11th Cir. 1986) the Eleventh Circuit rejected a similar argument: "This request for damages demonstrates that the employees' fraud claim not only 'relates to' an employee benefit plan, but is at its core an ERISA claim." *Phillips, supra*, at 1470.

ERISA," see Pet. App. 25a. There is no dispute that the benefits sought are provided by General Motors under an employee welfare benefit plan as defined in § 3(1) of ERISA, 29 U.S.C. § 1002(1). (Pet. App. 20a.)

Respondent's brief in opposition offers no reason for doubting this claim for VTEP benefits arises solely under federal common law. As this Court explained in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n. 26 (1983):

> ERISA's legislative history indicates that, in light of the Act's virtually unique preemption provision, see § 514, 29 U.S.C. § 1144, "a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."

And as Justices Brennan, White, Marshall, and Blackmun pointed out in their concurring opinion in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 3098 n. 14 (1985) (quoting conference report): "*All* such actions in federal or state courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under Section 301 of the Labor-Management Relations Act of 1947" (emphasis supplied).

Similarly this Court in *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41 (1987) explained that ERISA's civil enforcement remedies were exclusive:

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of the remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive. This conclusion is fully confirmed by the legislative history of the civil enforcement provision. The legislative history demonstrates that the pre-emptive force § 502(a) was modeled after § 301 of LMRA.

481 U.S. at 54.

Again in *Ingersoll-Rand v. McClendon*, 59 U.S.L.W. 4033 (U.S. Dec. 3, 1990), this Court held that plaintiff's claim that his employment was terminated unlawfully to preclude the vesting of his pension arose solely under federal law, ERISA. In *Ingersoll-Rand* this Court distinguished its holdings in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) (ERISA did not preempt state's general garnishment statute even though it applied against participants in welfare benefit plan) and *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (State law requiring the payment of severance benefits not preempted by ERISA because statute does not require establishment or maintenance of an ongoing plan):

> Neither of these limitations is applicable to this case. We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan. Nor is the cost of defending this lawsuit a mere administration burden. Here, the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension *plan* itself.

59 U.S.L.W. at 4035.

These principles, repeatedly declared by this Court in recent decisions, demonstrate the fundamental error in the decision of the court of appeals. Because of the conflict with past decisions rendered by this Court, the present case plainly is appropriate for review.

II. ERISA PREEMPTION CANNOT BE AVOIDED BY CHARACTERIZING THE CLAIM FOR BENEFITS UNDER AN ERISA-COVERED BENEFIT PLAN AS SOLELY A CLAIM AGAINST THE EMPLOYER

Respondent suggests that because his claim is against the employer for its failure to keep a promise unrelated to the administration of the plan,[4] the outcome will not implicate benefit plans (Opp. 27). Such is not the case.

Congress' central purpose in limited ERISA remedies was to carefully balance the protections afforded employees against the liabilities to which employers would be exposed by establishing and maintaining benefit plans. The success of the employee benefit system is largely dependent upon the employer's voluntary decision to establish and maintain pension and welfare plans in the first instance. Congress knew that imposition of excessive liabilities upon employers would discourage the formation of new plans. In *Massachusetts Mutual Life Ins. Co. v. Russell*, *supra*, this Court stated: "Congress was concerned lest the cost of federal standards discourage the growth of private pension plans," 473 U.S. at 148 n. 17. Similarly Senator Nelson emphasized the importance of this concern during floor debate on the bill that eventually was enacted:

> [Costs are] an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, . . . Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

102 Cong. Rec. S15,762 (daily ed. Aug. 22, 1974), 3 Leg. Hist. 4800.

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[4] General Motors Corporation is the administrator of the Voluntary Termination of Employment Plan, VTEP. Thus, Respondent, in bringing his claim against General Motors, necessarily is bringing a claim against the plan administrator.

There is nothing in ERISA's text or legislative history to indicate that Congress intended to protect only plan administrators and fiduciaries from additional state liabilities and oblibations. ERISA's preemption provision applies by its very terms to § 510 of ERISA, 29 U.S.C. § 1140, which imposes liability on employers who (unlike plan administrators and fiduciaries) are in a position to discriminate against or discharge employees.

The numerous employer obligations imposed by ERISA are plainly part and parcel of ERISA's integrated regulatory scheme. While it is the employer who must decide to establish a benefit plan and who determines the level of benefits provided (voluntary decisions outside the scope of the law), once the plan is established ERISA imposes numerous specific obligations on the employer.[5] These employer obligations are part of the careful balancing of the rights of plan beneficiaries, fiduciaries and employers fashioned by Congress when ERISA was enacted, a balancing premised upon the need to avoid discouraging the establishment or continuation of benefit plans.

As the House Report stated, Congress was "constrained to recognize the voluntary nature of private" plans and accordingly weighed "[t]he relative improvements required by this Act . . . against the additional burdens to be placed on the system." H.R. Rep. No. 533, 93d Cong., 1st Sess. 1 (1973), 2 Leg. Hist. 2348. Senator Long explained the importance of carefully defined limited employer liabilities during the floor debate prior to the final passage:

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[5] See for example 29 U.S.C. §§ 1053, 1053, 1082, and 1083, imposing participation, vesting standards and levels of funding required by the employer with respect to pension plans; 29 U.S.C. § 1059 imposing reporting obligations on employers; and 29 U.S.C. §§ 1140 and 1141 prohibiting employers from interfering with benefit attainment and prohibiting intimidation of plan participants by employers.

> We who have worked intimately on this legislation have always kept in mind that private pension plans depend for their very existence on voluntary action. We know that new pension plans will not be adopted and that existing plans will not be expanded and liberalized if the costs are made overly burdensome, *particularly for employers* who generally foot most of the bill. This would be self defeating and would hurt rather than help the employees for whose benefit the legislation is designed.

120 Cong. Rec. 29944-45 (1974), 2 Leg. Hist. 4778 (emphasis added).

Respondent's erroneously suggests that because his claim is against the employer it does not implicate the administration of the plan. Such premise was clearly rejected by Congress in the design and enactment of ERISA. Such premise was also rejected by this Court in *Ingersoll-Rand v. McClendon, supra.*

III. THE SIXTH CIRCUIT DECISION BELOW UTILIZING A THREE-FACTOR TEST IN DETERMINING PREEMPTION CONFLICTS WITH DECISIONS OF THIS COURT, ADDS CONFUSION IN INTERPRETING ERISA, AND SHOULD BE REVIEWED BY THIS COURT

The question presented by the petition is not one of mere academic concern. It arises frequently in litigation in federal district courts. And it can be expected to arise with increasing frequency due to the opinions of this Court and other circuits which conflict with the Sixth Circuit decision below. Ths is certain to generate large expenses for the sponsors of ERISA plans, and to undermine the Congressional goal of efficient plan administration.

The brief in opposition merely attempts to demonstrate that the Respondent's claims satisfy the three-factor

test [6] adopted by the Sixth Circuit below. It fails to address or support the validity of such three-factor test. This Court has clearly enunciated on several occasions the method of determining whether a claim "relates to" an employee benefit plan covered by ERISA. In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983) this Court explained that "[i]n deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue." In interpreting the "relate to" clause of § 514 of ERISA, this Court in *Shaw* held that "[a] law 'relates to' an employee benefit plan in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw*, *supra*, at 96-97. This definition was again applied in *FMC Corporation v. Holliday*, 59 U.S.L.W. 4009, 4011 (U.S. Nov. 27, 1990).

In *Ingersoll-Rand*, *supra*, at 4034, this Court noted: "[T]he question whether a certain state action is preempted by federal law is one of congressional intent." This Court further explained in *Pilot Life Insurance Co.*, *supra*, that federal preemption necessarily results in the exclusion of otherwise available state remedies:

> [T]he detailed provisions of § 502(a) set forth a comprehensive enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. *The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state*

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[6] The Sixth Circuit below relied on a three-factor test to determine whether a claim relates to a benefit plan: (1) whether ERISA provides a remedy, (2) whether benefits are sought under the plan, and (3) whether the claim implicates the administration of the plan, see Pet. App. 5a.

> *law that Congress rejected in ERISA.* (emphasis added)

481 U.S. at 54.

The confusion resulting from the Sixth Circuit decision below and from the decision in *Perry v. P*I*E* Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989) (concluding that the lack of a federal remedy was a key factor in denying preemption) is not imaginary. The district court in *Isaac v. Life Investors Insurance Co.*, 749 F. Supp. 855 (E.D. Tenn. 1990), upon reviewing conflicting Sixth Circuit decisions, lamented: "This Court is, therefore, left in a quandry." See Pet. pp. 16-17.

Failure to give effect to ERISA's preemption clause in cases seeking benefits under ERISA-covered benefit plans—which go to the very heart of the operation of ERISA's benefit plans—poses a serious threat to the integrity of the federal statutory scheme.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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